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BEFORE THE

Federal Communications Commission

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In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS

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SUMMARY

Commentors, all of whom own and operate cable systems, believe that the Commission's decision to revisit and revise its leased channel rate formula is ill-timed and ill-advised. The NPRM views the under-utilization of leased channels as a failure to realize Congress' goal of achieving a diversity of programming sources, and then concludes that the problem must be that the rates charged for leased channels are too high. However, the cable industry is in the midst of a programming explosion, with dozens of new networks launching every year. Diversity of programming is simply a non-issue. Congress' goal is being realized many times over. As for leased channel rates as a barrier to entry, Commentors submit that rate levels are not the problem. For one thing, the economics of programming are such that the mere fact that a lessee has to pay anything for channel space makes success problematic. Programmers with attractive product get paid by cable operators, and this revenue, together with the sale of advertising time, is what makes the venture viable. Paying to get on a cable system critically alters this equation. Only shopping channel variants can make the economics work. Lowering lease rates will only make leasing a better bargain for this type of programmer. Commentors also believe that rates have not been a significant issue for part-time programmers because prorating the current formula's full-time rate produces a very low hourly rate.

The NPRM's attack on the current highest implicit fee formula is simply a make-weight argument to give cover for the adoption of a new formula designed to produce significantly lower rates. The current formula was fashioned to produce a rate which serves as a surrogate for the revenue which the cable operator would have derived if it could program the channel being leased. It can of course be attacked for not being precise or cost-based, but Commentors believe that it is as good an approximation of the unquantifiable costs to a cable operator of leasing a channel as any alternative formulation.

The new rate formula proposed in the NPRM purports to be more exact, measuring the net lost opportunity costs of leasing a channel. However, it suffers from as many deficiencies as the current formula. For example, the lost advertising revenues and commissions have no future adjustment mechanism; the economic effect on a system of bumping attractive programming is ignored; the opportunity cost surrogate for dark channels produces near-zero rates; and cost averaging dooms the cable operator to undercompensation unless all designated channels are leased. Most importantly, however, since many of the identifiable lost opportunity costs cannot be quantified, and thus the NPRM proposes to exclude them, the proposed formula is noncompensatory to the cable operator.

If the Commission still believes that the formula must be changed, Commentors suggest that an alternative to the NPRM's proposal must be found. One possibility is to start with the median or average implicit fee for all channels on the tiers on which the designated channels are located, add an appropriate mark-up, and derive a per channel maximum charge. This would then be multiplied by the number of subscribers to the tier on which the leased channel was located. Separate calculations should be made for home shopping and premium channels because the economics do not allow for a satisfactory single calculation. Finally, Commentors believe that a minimum rate mechanism should be adopted for small systems. Even the current formula produces minuscule lease rates for such systems, particularly for part-time use.

Commentors also express views on many of the other issues raised by the NPRM. These include a suggestion that lessees who occupy channels where a program service had to be bumped should continue to pay under the highest implicit fee formula; and that the Commission should require a significant time commitment before a new part-time lease channel is created.

Lastly, Commentors raise two matters not dealt with in the NPRM. First, Commentors discuss the protection against potential liability which a cable operator should be able to obtain from a channel lessee. Second, Commentors urge the Commission to begin considering the issue of calculating a cable system's leased channel set-aside requirement in the coming digital environment.

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COMMENTS

Adelphia Communications Corporation, Century Communications Corp., Falcon Holding Group, L.P., Insight Communications, Inc. and Lenfest Communications, Inc. (hereinafter "Commentors") hereby submit their comments in the captioned rulemaking.[1] Each of the Commentors owns and operates cable television systems and therefore each has a vital interest in the outcome of this proceeding.

PRELIMINARY STATEMENT

Mandatory leased access was initially established by Congress in the 1984 Cable Act. That legislation required that cable systems make available a portion of their activated channel capacity for lease to unaffiliated third parties. The rates which cable operators could charge for such channel usage were left to the marketplace. Cable operators were permitted to

[1] Further Notice of Proposed Rulemaking in CS Docket No. 96-60, FCC 96-122, released March 29, 1996 ("NPRM").

establish "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[2]

The 1992 Cable Act amended Section 612 by, among other things, directing the Commission to set maximum reasonable rates which a cable operator could charge for leased access. This was done in order to promote "competition in the delivery of diverse sources of video programming."[3] Congress was concerned that the marketplace approach to leased access rates might be inhibiting video programming diversity.[4]

Pursuant to the 1992 Cable Act, the Commission adopted the rate formula presently in use, the "highest implicit fee" methodology. However, the adoption of that formula in 1993 did very little to stimulate the use of leased access capacity. Concerned that rates may still be a barrier, the Commission has decided to embark on a reconsideration of the highest implicit fee formula "from an economic perspective." The Commission's tentative conclusion in the NPRM is that the highest implicit fee formula overcompensates cable operators and does not sufficiently

[2] 47 U.S.C. § 612(c)(1).

[3] 47 U.S.C. § 612(a).

[4] See, e.g., Senate Report No. 92, 102d Cong., 1st Sess. (1991), pp. 29-32.

promote the goals of diversity which underlie Section 612 of the Act.[5]

Commentors believe that the Commission's reexamination of the formula for setting leased access rates is premature and ill-advised. Leased channels were first mandated in 1984 so as ". . . to assure access to cable systems by third parties unaffiliated with the cable operator, and thereby promote[] and encourage[] an increase in the sources of programming available to the public."[6] Congress amended Section 612 in 1992 to require the Commission to adopt a rate formula because it was concerned that the purposes of leased access were not being served. In 1996 Congress adopted the most comprehensive overhaul ever of the Communications Act, but Section 612 was left untouched. Commentors submit that it is fair to infer that Congress was not displeased with the development of video programming diversity. Indeed, although it may not have happened via the vehicle of leased access, any objective analysis will reflect that the availability of a diverse array of programming sources is at an all-time high.[7]

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[5]Commentors note that the Commission's interim decisions in ¶¶ 35 and 36 of the NPRM to exclude must-carry signals and PEG channels from the highest implicit fee calculation and to require tier-by-tier calculations will often cause the anomalous result of lease rates being higher on the CPST than on the more highly penetrated BST.

[6]House Report No. 98-934, 98th Cong., 2d Sess. (1984), p. 47.

[7]See, <u>e.g.</u>, <u>Broadcasting & Cable</u>, April 29, 1996, p. 61 ("nearly 100 new cable networks").

Moreover, the Commission has no evidence that the reason why channel leasing is infrequent is that the rates are too high. The vast bulk of inquiries regarding leased access are for part-time use. Proration of full-time rates permits part-time use at very inexpensive rates. Because of this, rates for part-time use have not been a barrier to the use of leased channels. With extremely rare exceptions, the only full-time lease requests to date have been for variants of home shopping services. As to those, Commentors submit that lease rates under the current formula are more economically advantageous for a successful home shopping service than if it signed a standard home shopping channel affiliation agreement since commissions are not credited to the cable operator under the lease rate formula. As for other full-time use, Commentors submit that if a programmer creates attractive programming, the cable operator will pay for that programming or perhaps agree to carry the programming at no cost for a trial period. As shown by the numerous new programming networks which are launched each year and the many more which are now on the drawing board, where demand is perceived, cable operators will put new programming on their systems.

If programming is so unattractive that a programmer has to pay to get on a system, it is unlikely that the programming will ever find audience acceptance. Commentors believe that production cost and program quality, not leased channel rates, are the real reasons for leased channel inactivity. In other words, lower channel leasing rates, looked at in a vacuum, are not the cure for the paucity of use of leased channels. Indeed, it can be argued that Congress' concern when it enacted the leased access provision in 1984, which was that new unaffiliated programmers would be squeezed out, has not come to pass. Instead, new programmers have proliferated as cable systems have enlarged their channel capacity and sought new programming. Whether this has happened because of, or in spite of, Section 612 is unimportant. What is important is that Congress' goal is being realized.

The NPRM's attack on the highest implicit fee formula is merely an excuse for proposing a formula which will produce drastically lower lease rates. As will be demonstrated below, the formula proposed in the NPRM produces rates which are noncompensatory to the cable operator and which are so low that if leased channels are not then utilized, the Commission will have proved to the world that the problem is not rates. However, if leased channel capacity is utilized at these noncompensatory rates, it is the cable operator who will be injured in contravention of Section 612(c)(1)'s injunction that lease rates ". . . not adversely affect the operation, financial condition, or market development of the cable system."

The quantifiable opportunity costs which a cable operator can recoup when it leases channels under the NPRM's proposed formula do not begin to compensate the cable operator since the principal "cost" of channel leasing is not quantifiable. The proposed opportunity cost formula is at least as artificial a construct as the highest implicit fee formula which it would replace. The difference is a precipitous decline in potential revenue to the cable operator. The Commission should not be gambling the cable industry's future as a competitive telecommunications provider in order to test a questionable theory as to why so little leased access capacity is being utilized today.

Commentors herein critique the proposed new formula and suggest a possible alternative. Commentors also offer views on many of the other issues set forth in the NPRM, including part-time leasing and bumping incumbent programming services. Finally, Commentors discuss two issues which are not raised in the NPRM, protection of the cable operator from liability and channel leasing in a digital environment.

A. THE NPRM'S CRITIQUE OF THE HIGHEST IMPLICIT FEE FORMULA IS INVALID.

The Commission purports to believe that the existing leased channel rate formula does not serve the goal of making leased access a more desirable alternative for programmers. In order to reach this conclusion, the NPRM finds that the formula overcompensates cable operators. The NPRM's critique of the current formula does not stand up to close scrutiny. It is obviously done as an excuse to be free to adopt a new formula which produces much lower rates.

1. Double Recovery

The NPRM first says that the highest implicit fee formula allows double recovery of subscriber revenues by the operator.

The formula starts with the average per channel revenue for the tier on which the leased access programming is carried. If the amount that the cable operator pays for programming is zero on one of the channels on the tier, the highest implicit fee received by the cable operator would thus be equal to the per channel revenue which the operator derives from the subscribers to that tier. According to the NPRM, the cable operator then would be collecting the same revenue from both the subscriber and the lessee, giving rise to the characterization of the formula as being a form of "double billing." On the other hand, when the Commission promulgated the formula in 1993, what it was trying to do was to approximate the revenue a cable operator would derive from such a channel in a regulated environment if the cable operator itself could choose the program service to place on that channel. Thus, the highest implicit fee attempted to compensate the cable operator for the revenue which it could not otherwise derive from the channel. Such revenue includes not only lost advertising and commissions, but also loss of current subscribers, inability to attract new subscribers, and decreased flexibility to recover the value of the tier because of the lesser appeal of the programming on the leased channel. While it can be said that the highest implicit fee formula is arbitrary, it should be seen for what it was intended to be, namely, a surrogate for the revenue which the cable operator would otherwise have earned from its own use of the channel. Thus, to call the formula a form of double billing is an unfair and self-serving characterization.

2. Use of the Highest Implicit Fee

Because the highest implicit fee formula allows the cable operator to charge a leased access programmer based on the channel with the highest margin over programming cost, the NPRM concludes that the formula is likely to overcompensate the operator as compared to the revenue it derives from any other non-leased access programming. Again, the Commission appears to have purposely skewed its vision because of its bias against the current formula. The reason the cable operator pays higher programming costs to many non-leased access programmers is because in return it is granted the right to sell advertising on a popular channel and because the programming is so attractive that it enhances the value of the tier. This increases subscribership, prevents subscriber churn and, of increasing importance, allows the cable operator to maximize its program offerings in competition with the burgeoning array of alternate video distributors who do not have the same leased access obligations. Program services for which the cable operator pays little or nothing, other than broadcast stations, are commensurately less valuable from a revenue-raising and attractiveness standpoint. In other words, the cable operator usually makes more money, directly and indirectly, from a costly non-leased access program service than from a free or low-cost programmer.

3. Lack of a Cost Base

The NPRM states the obvious when it criticizes the current formula as not being based on the reasonable costs that leased access programming imposes on cable operators. The NPRM suggests that the leased channel rate should be high enough to recover all reasonable costs of leasing plus a reasonable profit and that any rate which is higher discourages leased access and rewards cable operators. However, the Commission cannot have it both ways. Just because channels are not leased does not mean the rate is too high and if channels are not leased the cable operator is not rewarded by its channel lease rates. Moreover, the cable operator is not simply leasing one channel to a lessee. If that was the case, perhaps channel value could be calculated on the basis of some lost opportunity cost formula. However, a cable operator is also leasing its marketing, its history and reputation, its packaging of services on the tier on which the leased channel is placed and all of the other intangibles which go into the creation, promotion and operation of a successful business. While it may be true that the highest implicit fee formula is not cost-based, the NPRM's attempt to substitute a lost opportunity cost formula falls woefully short of the mark.

B. PROPOSED NEW RATE FORMULA

The theoretical underpinning of the NPRM's proposed formula is to allow a cable operator to recover its operating and opportunity costs associated with leased access, plus a reasonable profit. As proposed, however, the NPRM's formula would not allow a cable operator to recover its operating costs except when leased channels are used for pay per-view or pay per-channel services billed directly to the subscriber, and the only opportunity costs which could be recovered are those which can reasonably be attributed to carriage of the leased access programming and which are reasonably quantifiable.[8] Thus, the Commission admits at the outset that its formula produces a noncompensatory rate.

1. Operating Costs

The first portion of the formula is the "operating cost." The NPRM states that these are the fixed and variable costs that the cable operator incurs regardless of what programming is carried over the channel. For purposes of the cost formula, the Commission has decided to use subscriber revenue per channel as a surrogate for operating costs. Putting aside that this is the kind of approximation which the NPRM itself criticizes in the context of the highest implicit fee formula, the end result does not even realize the Commission's aim. This operating cost approximation is netted out of the final maximum charge for all leased channel uses except premium channels because the NPRM concludes that these costs are recovered from the subscriber as part of the rate it pays for the tier on which the leased channel

[8]Unless Commentors have missed something, neither the text of the NPRM or the formula examples in the appendices thereto ever add any "reasonable profit" to the calculated rate.

is located.[9] This does not necessarily follow. A cable operator's per channel costs are not restricted by regulation but the rate to subscribers is. Thus, even if a cable system's costs are evenly distributed on a per channel basis, its revenues may not be. For example, a system may price its basic tier below cost (voluntarily or because of the Commission's rate formula) and make up the shortfall on premium services. In such a case, the NPRM's assumed equivalency between per-channel operating costs and subscriber revenue would be false, thus resulting in a failure to recover all operating costs from a channel lessee.

2. Lost Advertising Revenue

The first opportunity cost that the Commission would build into the formula is lost advertising revenue. This would be a quantifiable cost when the operator is forced to bump a non-leased access programmer which generates advertising revenue to the operator. The NPRM proposes that the operator should be entitled to recover from the leased access programmer an amount equal to the advertising revenue derived from the current programming. While this factor may seem fair in concept, it has obvious deficiencies in practice. First, the NPRM proposes that this be done on an average for all of the channels designated for lease. Some designated channels will yield less advertising

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[9]The NPRM states that channels designated for lease could come from three categories: regular program channels, dark channels, or premium channels. Commentors believe that it is unlikely that a cable operator would designate a premium channel [illegible]

revenue than others and some of the designated channels may even be dark. Unless all of the set-aside channels are fully leased, however, the cable operator will not recover its lost advertising revenue if only the higher revenue channels are leased.[10] Second, how this amount would be adjusted each year is not discussed in the NPRM. If all set-aside channels are leased or at least those which contain advertising, updated information to permit this factor to be adjusted will not be available. If the present trend of rising advertising revenue to cable operators continues, there is a potential for further undercompensation to the cable operator unless an adjustment mechanism can be designed.

3. Lost Commissions

The NPRM proposes to permit recovery of any lost commissions. This would obviously apply to shopping channels where the operator receives a percentage of the programmer's revenues derived from the sale of goods. Insofar as this factor can be quantified for a designated channel, this revenue loss would be factored into the cost formula. The future adjustment problems described above would also apply here. In addition, no consideration is given to the competitive impact which a home shopping lessee would have on the cable operator's revenues from any other home shopping programmers on the system from whom the cable operator receives commissions. Nor does this factor

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[10]As noted, infra, this is particularly true in the case of part-time channel leasing.

account for the loss of goodwill from subscribers who resent oversaturation of home shopping channels. The net result would be that this opportunity cost factor would not be fully compensatory.[11]

4. Rate Reductions

The NPRM states that another opportunity cost would be any reduction in the rate the operator charges the subscriber for the tier as a result of the substitution of the leased access programming for the bumped non-leased access programmer. Since the NPRM is looking at only quantifiable opportunity costs, Commentors presume that the NPRM is referring to the decrease in rates which would be mandated by the Commission's rate regulation formula because of any reduction in programming costs to the operator. However, of greater significance, the NPRM has concluded that the formula should not explicitly include revenue loss because of a decrease in existing subscribership to a tier caused by attractive programming being dropped in favor of less attractive leased access programming. The NPRM states that this is too speculative. However, it is this very loss of actual and potential subscribership which is the principal "cost" which leased access programming imposes on a cable system. In addition, as noted above, price elasticity is decreased by a degradation in the total quality of programming on a tier and the attractiveness of the tier to new subscribers is also adversely

[11]This leads to the conclusion that it would be unlikely that a cable operator would designate a shopping channel for lease, just as in the case of premium channels.

affected. This effect is multiplied when more than one designated leased channel on a given tier is actually leased. By stating that these factors should not be taken into consideration because they are difficult to quantify, the NPRM in effect concedes that its opportunity cost formula is deficient and noncompensatory.

5. Dark Channels

Since any dark channel which is designated as one of the set-aside channels can have no quantifiable opportunity costs, the NPRM proposes to allow cable operators to approximate the opportunity costs of a dark channel by assigning it the per-channel opportunity cost of the program channels with the lowest positive value. Such channels would not include required channels such as must-carry, PEG or any leased access channels already in use. Commentors wish to point out to the Commission that the lowest positive value opportunity cost channels will have a value of at or near zero. This would put the cable operator in an untenable position. If it designates dark channels for its leased access set-aside in order avoid bumping existing programmers, the charge it may be able to impose for leased channels will be reduced to near zero. Moreover, the programming channels with the lowest positive opportunity cost values are either going to be channels with a high public interest quotient or the very type of marginal programming service which the leased channel rules are designed to serve. Therefore, any attempt to equate these channels with dark channels designated for leased access is an invalid concept on both economic and programming grounds. It is therefore bad policy to assume that the channels with the lowest opportunity costs are the most likely to be bumped and therefore that they are the best surrogate for dark channels.

6. Cost Averaging

Once the per-channel opportunity costs for the set-aside channels have been calculated, the NPRM proposes that the cable operator should average these per-channel costs in order to arrive at the cost-based maximum for a leased access channel. Even if the proposed formula accurately approximated the recovery of the costs to the cable operator of leasing a channel, the cable operator will not recover these costs if only the channel with the highest positive opportunity costs is leased since the cable operator can only charge the average. Commentors again wish to point out how low these figures are likely to be. Since cable operators are unlikely to designate premium or shopping channels for lease, and regular programming channels with high opportunity costs are too popular to designate, low cost and dark channels will be designated. This will produce rock bottom rates.

The NPRM states that the cable operator would have to charge the same rate to each leased channel lessee. However, the Cable Act does not preclude a cable operator from discriminating in its leased channel rates so long as the maximum rates calculated under the applicable formula are not exceeded. Thus, Section

612(c)(2) states that a cable operator "may consider [program] content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person." Commentors believe that this means that the cable operator can take into consideration the mix of programming on its system in deciding what rate it will charge. Thus, the cable operator may wish to charge the highest possible rate to someone proposing the fourth golf channel on its system but charge a much lower rate for the first lacrosse channel. Using the NPRM's proposed opportunity cost formula as an example, the cable operator should be permitted to charge as much as the rate produced by the set-aside channel with the highest opportunity cost. This rate would then be averaged with the lower rates charged for other leased channels.

C. SUGGESTED ALTERNATIVE RATE FORMULAS

1. Possible Alternative Formula

The NPRM concludes that the current rate formula must be producing rates which are too high because of the paucity of leased channel activity. In its place, a formula is proposed in the NPRM which produces rates approximately 75-90% below those produced by the highest implicit fee formula.[12] As pointed out above, the unquantifiable aspects of the opportunity cost concept results in a proposed formula which is far from compensatory to the cable operator. This result cannot be what Congress intended

[12]Commentors ran sample calculations on real systems. For example, one system's prorated hourly rate decreased from $19.80 to $2.20. Another system's rate dropped from $7.50 to $0.85.

in the 1984 and 1992 Cable Acts. Should the Commission persist in its view that a lowering of leased channel rates is necessary in order to strike a balance between promoting diverse sources of programming and compensating cable operators for the use of their channel capacity, Commentors strongly suggest that an alternative formulation must be found.

One possibility which Commentors put forward for the Commission's consideration is to use the average or median implicit fee for all of the programming channels on the tiers on which the designated leased channels are located, add an appropriate mark-up, and thus derive a per channel rate. This could then be multiplied by the number of subscribers to the tier on which the particular designated channel was located to arrive at the maximum permissible lease rate. Commentors realize that this is not a method for quantifying the operating and opportunity costs to the cable operator but, as explained above, the true cost to the cable operator cannot be quantified. A rate which is somewhat in excess of the quantifiable opportunity costs, however, begins to approach a rational compromise because it recognizes that there are costs for which the cable operator should be compensated above and beyond measurable opportunity costs. The rate which this formula would produce would be lower than the rate which the present formula produces, would not be susceptible to cable operator manipulation, and should not serve as a price barrier to any leased channel programmers which truly provide programming diversity in response to consumer demand.

2. Separate Calculations

Commentors also submit that there should be separate calculations for home shopping and premium channels. The present methodology for premium channels will work using Commentors' suggested average implicit fee approach As to shopping channels, however, Commentors submit that the Commission erred in ¶ 37 of the NPRM when it concluded that commissions paid by shopping programmers should not be included in the implicit fee calculation. If cable operators are allegedly overpaid for channels leased for regular programming, a conclusion which Commentors contest, then they are assuredly underpaid when a home shopping programmer leases a channel at the highest implicit fee rate if commissions are not factored into the calculation.

3. Small System Rates

Finally, Commentors submit that the Commission should consider adopting a minimum rate for small systems. Even under the current formula, full-time rates are extraordinarily low and part-time rates are a virtual giveaway. For example, assume a 500 subscriber system with a 15-channel BST at a monthly rate of $12.00. Under the highest implicit fee formula, even assuming a BST channel with no programming charge, the monthly lease rate would $400 and the prorated rate would be $0.55 per hour.[13] This means that a person could lease a channel for six full hours for

[13]Lest the Commission think that this problem is de minimus, and thus not want to deal with the issue in this rulemaking, Commentors note that Commentor Falcon operates 137 cable systems which have less than 1,000 subscribers, and 84 of those have less than 500 subscribers.

about the same rate as it would cost to rent a video from Blockbuster! These already low rates would be dramatically reduced under the formula proposed in the NPRM.

Commentors suggest that neither the current rate formula, nor certainly the one proposed in the NPRM, can produce a lease rate which is close to compensatory for small systems. Lease rates are supposed to compensate cable operators for airtime, but the cost of airtime per subscriber increases as the number of subscribers to a cable system decreases. The Commission's formulas, current and proposed, are not sensitive to this incremental cost phenomenon. Thus, small systems, with commensurately higher airtime costs per subscriber, are compensated less for airtime than larger systems under the current and proposed formulas.

For these reasons, Commentors believe that the Commission should adopt a simple alternative methodology for such systems. The minimum monthly full-time rate for small systems could be set at $1.00 per subscriber, and the minimum hourly rate at $25.00. Small systems could be defined as those with 5,000 or fewer subscribers. Commentors are not wedded to these numbers, but they are offered to demonstrate that a rational rate mechanism can be adopted which would protect small operators from having to almost give lease channels away while still setting lease rates which are not prohibitive for prospective lessees.

D. OTHER ISSUES

1. Transition Issues

The NPRM proposes to allow its formula rate to be replaced by the marketplace once a cable operator's set-aside has been filled by channel lessees. Thus, an incumbent leased access programmer paying the NPRM's formula rate would have to negotiate for a marketplace rate at the end of its contract. Conversely, if the use of leased access channels dropped below the operator's set-aside requirement, the operator would have to return to utilizing the NPRM's formula. While the concept of moving to marketplace pricing is eminently sensible, the prospect of moving between the formula and the marketplace every time demand rises above or below an operator's set-aside requirement creates an inherently unstable situation. Not only is it true that demand for leased channels will fluctuate, but the amount of an operator's set-aside will increase when it rebuilds its system. It would be unfair for an operator which has filled its set-aside and now has marketplace rates in place to have to return to the formula because its newly increased set-aside is now unfilled. Commentors believe that once a cable operator has been allowed to move to marketplace rates, it should not have to return to use of the formula if its set-aside requirement increases because of a rebuild. Even if the use of leased channels drops below full utilization of an operator's set-aside in a non-rebuild situation, the reason for this change in demand cannot be assumed to be the rates charged in the marketplace. The Commission